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CASES CITED.

STATUTES CITED.

In the

Supreme Court of the United States

OCTOBER TERM, 1944

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation, *Petitioner*,

vs.

NELLIE COPELAND, Administratrix of the ESTATE OF JOHN W. HERTZ, Deceased, *Respondent*.

No. 733

Respondent's Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Missouri

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, Nellie Copeland, Administratrix of the Estate of John W. Hertz, Deceased, respectfully submits this, her brief, in opposition to petitioner's Petition for Writ of Certiorari to the Supreme Court of Missouri.

OPINION OF THE COURT BELOW.

The opinion of the Court below, here sought to be reviewed, is published in the Advance Sheets, 182 S. W. (2d) 600-607; and since respondent has not been furnished with a copy of the printed transcript of record (referred to on page 2 of petitioner's brief) our references herein will be made to the published opinion.

JURISDICTION OF THIS COURT.

The jurisdiction of the Supreme Court of the United States over this cause is not questioned by respondent.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This action was brought by respondent, in her capacity as Administratrix of the Estate of John W. Hertz, Deceased, against petitioner, under the Federal Employers' Liability Act, 45 U. S. C. A., Sec. 51, Act of April 22, 1908, Chapter 2, U. S. C., to recover damages for the wrongful death of her intestate, for the sole benefit of intestate's infant daughter, Shirley Hertz, his only heir at law and next of kin.

John W. Hertz, decedent, was killed on December 16, 1941, while engaged as a switchman for petitioner in spotting cars in interstate commerce at the loading dock of the Federal Barge Line, in St. Clair County, Illinois.

Petitioner admits (R. 15) that at the time of his death, decedent, John W. Hertz, was in its employ as a brakeman and engaged in interstate commerce.

THE PETITION.

Respondent's petition alleges: that decedent was working, as a brakeman, under the supervision of petitioner's train foreman, and engaged in spotting cars in interstate commerce at the loading dock of the Federal Barge Line, in St. Clair County, Illinois; that decedent was ordered and directed by petitioner's train foreman, to cut off the air and disengage the coupling between the fourth and fifth cars at the rear (or south) end of said train, which was then stopped and standing at the loading platform on the dock of said Federal Barge Line, and that petitioner, its said foreman, agents and servants, knew, or by the exercise of ordinary care would have known, that decedent, while so engaged, was in imminent peril and danger of being struck and injured by the movement of petitioner's said train.

That with the aforesaid knowledge, the petitioner, its said train foreman, agents and servants, carelessly and negligently: (1) caused and permitted its said train to be suddenly and unexpectedly backed with great force and violence; (2) suddenly and unexpectedly backed its said train, when petitioner knew that its said engine, air hose, air brakes and brake pins, were disconnected and in an unsafe and insecure condition; (3) caused and permitted its said train to be driven backward with great force and violence, when petitioner knew that its brakes were inadequate and insufficient to hold its said train at said loading platform; (4) caused and permitted its said brakes to be released thereby causing its said train to move backward with unusual speed; (5) caused and permitted its said train to be driven backward with great force and violence, when petitioner knew that said fifth car at the rear (or south) end of its said train was of unusual width and did not leave sufficient room for decedent to

pass between said car and said loading platform; (6) that petitioner's said train foreman left decedent with its apprentice brakeman, and moved into a position on top of said fifth car in defendant's said train, where he could neither see decedent or his signals, and from that position signaled petitioner's engineer to release the brakes and to back its said train suddenly and unexpectedly with great force and violence.

Here follows the usual allegations of appointment as administratrix; her qualification as such; the bringing of the suit within less than one year; that the suit was brought for the benefit of decedent's child; that decedent was twenty-seven years old at time of death; that decedent was able bodied; that decedent's infant daughter was his only heir at law, and dependent on decedent for support; and the prayer for damages.

THE ANSWER.

Petitioner, by its answer, admits that decedent was killed at the time and place mentioned in the petition; admits that both decedent and petitioner were at said time and place engaged in interstate commerce; but denies all other allegations.

Further answering, petitioner states that the risk and danger of standing at the point where decedent was injured, was open, obvious, and well known to decedent, and with that full knowledge decedent placed himself in the position which resulted in his death, thereby assuming all risk of injury.

THE EVIDENCE.

Petitioner's train (R. 18) consisted of a locomotive engine, with twenty-five cars attached, (R. 16) with train foreman, Thomas J. Dailey, head brakeman, Clarence B. Newman, rear brakeman, John W. Hertz (decedent), and student brakeman, Quinten Asselmeier, was, at the time in question, engaged in spotting cars in interstate commerce at the loading platform of the Federal Barge Line (R. 15) near East St. Louis, Illinois.

The Federal Barge Line dock (R. 18, 45) consisted of two concrete track barges, laid end to end—north and south—with two concrete warehouse barges, with loading platforms thereon, laid end to end, along, and attached to, the west side of said track barges, and the dock lay in the Mississippi River, just off the east shore.

On (R. 21) the night of December 16, 1941, petitioner's said train, with its foreman and crew, backed onto above mentioned dock for the purpose of spotting the rear (or south) four cars of its said train at "spot points 2, 3, 4 and 5," at the loading platform of the south, or lower, warehouse barge; (R. 19, 20) petitioner's train foreman, student brakeman, and John W. Hertz (decedent) rode on top of the rear (or south) car as the train backed onto the barge; (R. 47, 49) that the foreman of the Federal Barge Line, John Mulvaney, heard the train as it was backing in, and went to the south, or lower, warehouse barge, where he knew the cars were to be "spotted"; (R. 49) and was standing there on the loading platform of that barge when the train backed in and stopped; that the train backed too far south, i. e., beyond the "spot points"; (R. 37) that the train foreman gave his engineer a signal to move the train back north, and just as the train stretched for the move back north (R. 37, 49) the

dock foreman, Mulvaney, told the trainmen to leave the cars where they were; when the train stopped (R. 32) the train foreman was on top of the fifth car from the rear, and the student brakesman, and John W. Hertz (decedent) were on the rear car; that the student brakeman and decedent got off said rear car, onto the platform of the warehouse barge, and walked north to a point opposite the space between said fourth and fifth cars at the rear of said train, where the train foreman met them and directed decedent to disconnect the air, and disengage the coupling, between said fourth and fifth cars, and to leave the rear four cars at the loading platform; (R. 23) that decedent got down off the loading platform and onto the track barge, and stood on the west side of the coupling between the ends of said fourth and fifth cars; (R. 30) while the train foreman stood on top of the south end of said fifth car, looked down and saw decedent manipulate the angle cocks, and disengage the air hose between those cars; (R. 24) that when he saw that all decedent needed was "slack" so he could release the pin and disengage the coupling, (R. 30) petitioner's train foreman left decedent in that position (R. 35) on the west side of said coupling, without warning him, and went to the center of said fifth car where he could neither see decedent, or his lantern, and had to depend on decedent's oral signal; (the evidence shows that petitioner's train foreman could not, and did not, depend on the student brakeman for signals); (R. 72) that about a minute after the train foreman left decedent, the decedent called for "slack", and the train foreman passed the signal for "slack" on to the head brakeman; (R. 31) that after the "slack movement" started decedent's oral signals would have had to been loud enough to overcome the rumble of the cars for the train foreman to have heard them.

That (R. 27) when decedent called for "slack", the train foreman, and (R. 81) the engineer, both knew just what was wanted, i. e. 8 to 10 inches of "slack" so decedent could raise the pin; (R. 40) and also knew that after decedent called for "slack" he was not permitted, under the rules, to cross to the east side between the cars; (R. 31) that it took five minutes to get the "slack" after the signal was given.

LENGTH OF "SLACK MOVEMENT."

Petitioner's train foreman testified, (R. 24, 71) **that it was night;** (R. 73) **that he stood on top in the center of the fifth car when the "slack movement" came;** (R. 28, 43) **that he judged a foot and a half of "slack" came, but that he could not tell how much, because it was night and he had nothing to judge by;** (R. 28, 29) that he heard someone yell, got off the car, and saw decedent crushed between the side of that fifth car and the edge of the loading platform.

Petitioner's student brakeman testified; (R. 99) **that when the "slack movement" came it looked like the 5th car moved two to four feet;** (R. 100) **that it caught decedent just as the movement started;** (R. 104) **that he started yelling when decedent got caught and was scared;** (R. 106) **that at the time he formed his judgment as to the length of the "slack movement", he was scared; that he was watching decedent and saw him trying to raise the pin;** (R. 105) **that decedent's left arm got caught just as the movement started,** and rolled him between the ladder on the side of said fifth car and the edge of the loading platform; **that it (the train) didn't move like the hands on a clock, and it was all over in a second or so.**

The dock foreman of the Federal Barge Line testified: (R. 49) that he stood on the platform of the south, or lower, warehouse barge when the cars backed in; that when the train stopped he opened the door of the car at "spot point 2", looked in, (R. 50) and then **went to the door of the car at "spot point 4", opened that door fully, and was standing at the south door post of that car when the "slack movement" came.** (R. 51) **that those cars moved south twelve feet; that he was not expecting a twelve-foot move, and looked to see what had happened;** (R. 52) saw the student brakeman giving the "washout" signal with his lantern, and then ran north and saw decedent crushed between the side of a box car and the edge of the loading platform.

Petitioner's engineer, testified, (R. 81) that when he got the signal for "slack" from the head brakeman, (R. 80) **that he released the brakes on the engine, let it drop back 6 or 8 inches, and then set the brakes again;** (R. 79) that he did not know whether the brakes were set on the cars in the train or not, that he was the only one who would know, because he handled the air.

Petitioner's head brakeman, testified (R. 96) that he knew nothing of the "slack movement" at the point of accident, that he was too far removed; (R. 96) **that the car he was on dropped back not more than 4 or 5 inches.**

THE TRAIN:

The evidence shows that as the train stood there prior to giving the "slack movement", (R. 37) it was stretched; (R. 77, 78) **that the engine was headed up the river bank on a steep grade; that the cars extended from the engine, down the river bank, across the cradle, up an incline and onto the track barge;** (R. 32) **that the rear eight cars of the train stood on the level, on the track barge.**

DISTANCE BETWEEN CARS:

Petitioner's trainmen testified; (R. 37) **that the train was "stretched" just before the "slack movement" was given,** and (R. 92, 94, 97) **that the space between the ends of the cars in that "stretched" train was between 3 and 4 feet.**

SLACK NECESSARY TO RELEASE PIN:

Petitioner's trainmen testified: (R. 26, 41, 44, 93) that there was **8 to 10 inches of slack in the couplings between cars in a stretched train,** and that it **takes 8 to 10 inches of slack at any particular coupling to release the pin.**

USUAL AMOUNT OF SLACK GIVEN:

Petitioner's trainmen testified: (R. 97) **that when you call for slack, you expect 8 to 9 inches of slack;** (R. 98) **that a foot or two wouldn't be out of the ordinary;** (R. 94) **that a brakeman, standing between the ends of those cars as decedent did, could take care of himself in a slack movement of 8 inches to 4 feet;** (R. 72) **that decedent could have walked along between the ends of those cars when the slack movement came, and not have been hurt, if the cars didn't move too fast.**

The evidence shows (R. 29, 30, 52) that decedent was lodged between the ladder on the west side of the car near its south end, and the edge of the loading platform, in such manner that the platform had to be cut to get decedent out.

That (R. 66) at the time of his death decedent was a healthy, able-bodied, steady working man, 27 years of age, with an average **earning of $200.00 per month,** and an **expectancy in life** (after deducting 7 years because of his occupation) **of 30 years;** (R. 67) that he was divorced

from his wife; that his five-year-old daughter, Shirley Hertz, still lives, and is his only next of kin and heir at law; (R. 68) that decedent contributed $5.00 per week toward the maintenance of his said child; had the child in his custody part of the time, and bought clothes for her; and that this suit was brought by decedent's personal representative for the sole benefit of decedent's said child.

Respondent submitted her case to the jury on the hypothesis (R. 110) that petitioner's negligence consisted in making the slack movement with unnecessary and unusual force and speed.

REASONS RELIED ON BY PETITIONER FOR ALLOWANCE OF WRIT.

Under above heading petitioner propounds, and undertakes to answer, three questions. (P. 9 of its Brief.)

I.

After a review of certain of its evidence, petitioner arrives at what it terms, (P. 10 of its Brief) "The inescapable conclusion, that decedent knowingly chose to attempt to uncouple those cars from the dangerous, rather than the safe side of the track."

The evidence does not warrant petitioner's conclusion; **its trainmen testified: (R. 92, 94, 97) that the space between the ends of the cars in that train was between 3 and 4 feet; (R. 26, 41, 44, 93) that it takes 8 to 10 inches of slack at any particular coupling to release the pin; (R. 97, 98) that the usual amount of slack given to release the pin varies from 8 inches to 2 feet; (R. 94) that a brake-**

man standing between the ends of those care as decedent did, could take care of himself in a slack movement of from 8 inches to 4 feet; (R. 72) **that decedent could have walked along between the ends of those cars when the slack came, and not have been hurt, if the cars didn't move too fast.**

The Court below, in its opinion, says (182 S. W. [2d] 600, l. c. 603-604):

> "From the evidence most favorable to plaintiff, we think the jury could draw the inference that there was no certain danger or extreme peril, nor even negligence, in the manner in which Hertz was proceeding to lift the pin; that his conduct was not the sole proximate cause of his death; and that he would not have been injured or killed, except for the negligence, if any, of defendant's employees in moving the train * * *".

It was not the position in which decedent stood that caused his death, (all trainmen testified that he could have walked along between the ends of those cars in the usual slack movement, and not have been injured) **but the negligence of petitioner's employees who, instead of giving decedent the usual slack movement, gave him,** (R. 51) **twelve feet of slack; that** (R. 105) **didn't move like the hands on a clock; that caught decedent immediately the movement started, and was all over in a second or so.**

Petitioner assumes that if decedent had stood on the east, rather than the west, side of the coupling, he would not have been injured. There is no evidence in the record to that effect, and we submit, that in a slack movement such as was given here, it would have made little difference on which side of the coupling decedent stood.

The Court below says (182 S. W. [2d], l. c. 605):

> "Since he was standing between the cars, immediately west of the drawbars, waiting to lift the pin when the slack came, he was in no danger from the platform, unless thrown into it by the negligent movement of the train."

So here, had he stood on the east side, he might have been knocked down and run over, rather than crushed to death. **It was the negligence of petitioner in making the slack movement "with unnecessary and unusual force and speed,"** rather than the position in which decedent stood, **that caused his death.**

II.

As decedent stood there, waiting for the slack for which he had called, he had the right (since petitioner's train foreman and its engineer both knew just what he wanted), **to expect "the usual slack movement, given in the usual way."**

Petitioner insists that the length of the slack movement be determined by the evidence of its **train foreman,** who testified: (R. 28, 43) **that he judged a foot and a half of slack came, but that he could not tell how much, because it was night and he had nothing to judge by;** and its **student brakeman,** who testified: (R. 99) **that it looked like that fifth car moved from two to four feet;** (R. 106) **that at the time he formed his judgment as to the length of the slack movement, he was scared;** rather than the **dock foreman,** who testified: (R. 50) **that he was standing at the south door post of the car at "spot point 4" when the slack movement came;** (R. 51) **and that those cars moved south twelve feet; that he was not expecting a move of that kind, and looked to see what had happened.**

Prior to that slack movement, **petitioner's train stood with its engine headed up a steep grade on the river bank, the cars dropped back from the engine, down the river bank, across the cradle, and up an incline onto the track barge.**

With the train in that position, we submit, that a movement (R. 80) **of 6 to 8 inches, of the engine,** as testified by the engineer, **and a movement** (R. 96) **of 4 or 5 inches,** as testified by its **head brakeman; could not have, in any manner, effected the slack movement at the point of accident,** and their evidence should not be considered.

The dock foreman, who was standing on the loading platform, **not on a moving car;** and who was three cars south of the point of accident, **and not scared, who was not expecting a 12-foot movement, and looked to see what had happened,** was in far better position to judge the length of the movement than where the other witnesses who testified in this case.

III.

The evidence of petitioner's own train foreman (R. 72) **that decedent could have walked along between the ends of those cars in the usual slack movement, and not have been injured, unless the cars moved too fast; and its student brakeman** (R. 106) **that decedent was trying to raise the pin;** (R. 105) **that decedent's left arm got caught just as the movement started,** and (R. 106) **that it (the train) didn't move like the hands on a clock;** evidence which petitioner says is uncontradicted, undisputed, unimpeached, not contrary to physical law, and not inherently incredible; **is sufficient in itself to warrant a finding that decedent's death was caused by the negligence of petitioner in making the slack movement "with unnecessary and unusual force and speed."**

PETITIONER'S AUTHORITIES.

Davis v. Hand, 290 F. 731; 263 U. S. 705; 68 L. Ed. 516; 44 S. Ct. 34: Plaintiff had completed his duty, gave signal for movement, and then placed himself in a position of danger.

Atlantic Coast Line R. Co. v. Driggers, 279 U. S. 787; 73 L. Ed. 957: Plaintiff, while performing no duty required of him, stepped off a foot-board and into the path of a moving train.

Atlantic Coast Line R. Co. v. Davis, 279 U. S. 34; 73 L. Ed. 603; 47 S. Ct. 210: Plaintiff abandoned safe position which he first assumed, and placed himself in a position of extreme peril.

B. & O. R. Co. v. Newell, 196 F. 866: Plaintiff ran alongside a moving train and into a place where employees were excluded by obvious situation.

Southern R. Co. v. Walters, 284 U. S. 190, 194; 76 L. Ed. 239, 242: Held: failure to stop train before entering street crossing, does not show, as a matter of law, that said failure was proximate cause of injury to child who collided with the side of the train.

Hunt v. Kane, 100 F. 256: Held: where engine became defective on run, leaking steam, and engineer couldn't see switchman whose foot was caught in frog because of steam, and couldn't stop because engine was too close when signal was given, defendant not liable.

P. R. R. Co. v. Chamberlain, 288 U. S. 333; 77 L. Ed. 819: Held: an inference of the existence of a particular fact from other proven facts, is not permissible in the

face of positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist.

Brady v. Southern R. Co., 88 L. Ed., Adv. Op. 189: Held: failure to guard against a bare possibility of accident is not actionable negligence.

Chesapeake & O. R. Co. v. Martin, 283 U. S. 209-218; 75 L. Ed. 983-989: Held: jury not at liberty, under guise of passing upon the credibility of a witness to disregard his testimony, when from no reasonable point of view is it open to doubt.

A review of the cases cited by petitioner disclose facts far different than in the present case, and are not applicable under the facts here.

BRIEF.

I.

FEDERAL EMPLOYERS' LIABILITY ACT.

Every common carrier by railroad, while engaged in commerce between any of the several States or Territories, or between any of the States or Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents; and, if none, then to the next of kin dependent on such employee, for injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purpose of this chapter, be considered as being employed by such carrier in such commerce and shall be entitled to the benefits of this chapter.

Federal Employers' Liability Act, Section 51, Title 45, Chapter 2, United States Code.

The Federal Employers' Liability Act is paramount and exclusive to the legislation of the States prescribing the liability of such carriers to their employees while engaged in interstate commerce.

Railroad v. Vreeland, 227 U. S., l. c. 66.
Adams Express Co. v. Croniger, 226 U. S. 491.
Gulf Ry. Co. v. Hefley, 158 U. S. 98.

II.

NEGLIGENCE.

The mere fact that some other cause operated with the negligence of the defendant, does not relieve it from liability.

I. C. R. R. Co. v. Skinner's Admx., 246 U. S. 663.

Under the Federal Employers' Liability Act, the action lies for "injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier.

Railroad v. Kerse, 239 U. S. 576.
Going's Admx. v. N. & W. Ry. Co., 248 U. S. 538.
C. V. R. R. Co. v. White, 238 U. S. 507.

Railroad company is liable for the negligence of its engineer in backing engine and tank, when he knew, or had reasonable cause to believe, that brakeman was between the ends of the cars intended to be coupled, if such negligence proximately caused the injury.

Louisiana R. & N. Co. v. McGlory, 20 F. (2d) 545.

CONTRIBUTORY NEGLIGENCE.

Contributory negligence constitutes no defense to an action under Sections 51-60 of this Title.

So. Pac. Co. v. Hackley, 296 U. S. 630.

Generally under this section, contributory negligence of an employee is not a bar to an action for an injury received by him, but only operates to diminish the amount of the damages.

M. St. P. & S. S. Ry. Co. v. Rock, 279 U. S. 410.

Brakeman going between cars to uncouple hose, and uncoupling cars by hand instead of stepping out and using the pin lifter, was not solely responsible for his death from sudden and negligent movement of cars.

C. R. I. & P. Ry. Co. v. Calloway, 282 U. S. 894.

A railroad company is liable where through its employees it is guilty of any causative negligence causing injury to an employee, no matter how slight the negligence is in comparison to the negligence of the injured employee.

N. Y. C. & St. L. T. Co. v. Niebel, 214 F. 952.

IV.

DUTY TO WARN.

The duty to warn employee of unsafe conditions is the duty of the master who cannot avoid responsibility for its non-performance by delegating it to a fellow servant.

Penn. R. Co. v. Minnix, 282 F. 47.

Where the conductor of a train, whose duty it is to look out for the safety of a brakeman working on the same train with him, gave the signal to the engineer to back the train while the brakeman was between the cars, HELD that he was guilty of negligence, rendering the company liable, where, in view of the circumstances, he had good reason to believe the brakeman was in that position.

I. C. R. R. Co. v. Norris, 245 F. 926.

Where the method of doing the work has a direct bearing on safety of servant, the duty is on the master to use reasonable care to provide a safe method, and he cannot escape liability by intrusting its performance to others.

Wilczynski v. Penn. R. Co., 90 N. J. Law 178.

V.

DUE CARE OF EMPLOYER.

An employee owes no duty to exercise care to discover extraordinary dangers arising from employer's negligence, but may assume that employer, or his agents, have exercised proper care for employee's safety until notified to the contrary, unless want of care and resulting danger are so obvious that an ordinarily prudent person would observe and appreciate them under the circumstances.

So. Pac. R. Co. v. Wieand, 309 U. S. 670.

The Federal rule is that the employee's knowledge and realization of extraordinary risk caused by the master's negligence must appear before it can be said that the employee assumed the risk.

Jenkins v. Wabash R. Co., 73 S. W. (2d) 1002, l. c. 1009.

In an action for the wrongful death of a railroad switchman killed while coupling an air hose on a train being made up, it was not error to refuse instruction exonerating defendant if the switching crew had no notice and were ignorant that the deceased was in a position of danger.

Mullen v. A. T. & S. F. Ry. Co., 191 Pac. 206.

VI.

FELLOW-SERVANT RULE.

The object of this chapter is to abrogate the fellow-servant rule in case of injuries to employees, and the negligence of "the officers, agents, and employees" is the negligence of the defendant.

C. R. R. of N. J. v. Young, 232 U. S. 602.

Under this chapter, as a general rule, the employer is liable to his employee for an injury resulting from the negligence of a fellow servant.

Chesapeake R. Co. v. DeAtley, 241 U. S. 310.

To render a railroad company liable for the death of an employee, struck by train, it is not necessary that the railroad company could have anticipated particular injury, but it is sufficient if its negligence is the proximate cause of the injury.

Kidd v. C. R. I. & P. Ry. Co., 274 S. W. 1079, 269 U. S. 582.

VII.

PROXIMATE CAUSE.

Under the evidence here submitted, the issue of proximate cause was for the jury.

C. R. I. & P. R. Co. v. Calloway, Adm'x, 282 U. S. 894.

ARGUMENT.

I.

FEDERAL EMPLOYERS' LIABILITY ACT.

Petitioner admits (R. 15) that decedent, at the time of his death, was in its employ as a brakeman engaged in interstate commerce. This action, therefore, was properly brought under the Federal Employers' Liability Act, by decedent's personal representative for the benefit of decedent's infant daughter, his sole surviving heir at law and next of kin.

II.

NEGLIGENCE.

Under the authorities cited, **petitioner is liable for death resulting, in whole, or in part, from the negligence of any of its officers, agents, or employees.**

Respondent contends that it was not the position in which decedent stood (on the west side of the coupling between those cars), **that caused his death** (all petitioner's trainmen testified there was ample room between the ends of those cars for decedent to have walked along and not been injured in the usual and customary slack movement of 8 inches to 4 feet—the movement which decedent had the right to expect), **but that his death was caused by the negligence of petitioner's employees in the unnecessary and unusual force and speed of that movement.**

The testimony; (R. 105) **"that decedent was caught immediately the movement started, that the cars didn't move like the hands on a clock," and "that it was all over in a second or so,"** given by petitioner's student brakeman; and the further evidence, (R. 50) **"that when the slack came those cars moved 12 feet,"** given by the dock fore-

man, bears out respondent's contention, that the slack movement was made with unnecessary and unusual force and speed.

III.

CONTRIBUTORY NEGLIGENCE.

Even though it could be said that decedent was negligent in taking the position he did between the ends of those cars, and thereby contributed to cause his own injury and death, it would be no defense to this action, and could only be taken into consideration to diminish the damages awarded.

Unless it can be said that decedent's negligence (if negligent he was) **was the sole cause of his death, and that petitioner, and its agents, were free from negligence, decedent's negligence, if any, would not bar recovery.**

IV.

DUTY TO WARN.

It was the duty of petitioner, if decedent assumed a position of "certain and extreme peril," as petitioner says he did, to have warned him.

The evidence shows: (R. 30) that petitioner's train foreman saw decedent there on the west side of the coupling between the ends of those cars; (R. 54) saw that all he needed was slack to release the pin, (R. 73) and knowing that decedent had to remain there until the slack came to raise the pin; (R. 30) left decedent and went to the center of the car where he gave the engineer the signal for slack; (R. 70) that the last time the train foreman saw decedent he was standing between the ends of those cars on the west side of the coupling; (R. 35) that he did not warn

decedent regarding his position; (R. 72) that a minute after he left decedent, that decedent called for slack; and (R. 40) that when he gave decedent's signal for slack to the engineer, he could not see decedent or his lantern.

In the case of I. C. R. R. Co. v. Norris, 245 F. 926, the Court says:

> "Where the conductor of a train whose duty it is to look out for the safety of a brakeman working on the same train with him, gave the signal to the engineer to back the train while the brakeman was between the cars, that he was guilty of negligence rendering the company liable, where, in view of the circumstances, he had good reason to believe the brakeman was in that position. That deceased did not assume the risk of such signal, that he had a right to believe the cars would not be moved while he was between them, and that it was the duty of the conductor, in spite of the fact that he testified that each employee was to look out for himself, to watch out for the safety of those under him."

And the case of Penn. R. Co. v. Minnix, 282 F. 47, the Court says:

> "That the duty to warn employee of unsafe conditions is the duty of the master."

In the present case, **when petitioner's train foreman gave the signal to its engineer for slack, he at least had good reason to believe, that decedent was still on the west side of the coupling between those cars, that is where he left decedent.** He testified (R. 72) that within a minute after he left him, decedent called for slack.

If, as petitioner states "decedent was in a position of certain and extreme peril," it was negligence on the part of petitioner not to have warned him; or to have given the slack in a manner commensurate with the danger.

V.

DUE CARE OF PETITIONER.

Decedent had the right to rely on the exercise of ordinary care on the part of his fellow employees, and **when decedent gave his signal for slack, the meaning of which was well known to both petitioner's engineer** (R. 81), **and its train foreman** (R. 27); **decedent had the right to expect the usual and customary amount of slack, i. e., 8 inches to 3 or 4 feet, given in the usual and customary manner. Decedent did not have to exercise care to discover extraordinary dangers arising out of petitioner's negligence**; he had the right to assume that his fellow employees, who knew what he wanted and knew the position he was in, would exercise due care for his safety.

Instead of receiving the usual amount of slack, in the usual way; decedent received (R. 50) **twelve feet of slack;** (R. 105) **that caught him just as the movement started; that didn't move like the hands on a clock, and was all over in a second or so.**

Under the evidence, we submit, that slack movement was made with "unnecessary and unusual force and speed."

VI.

FELLOW SERVANT RULE.

Under the evidence there is no question but that petitioner's trainmen were negligent in the giving of that slack movement.

The train foreman (R. 30) stood on top of the south end of that 5th car, looked down and saw decedent manipulate the angle cocks, and disconnect the air hose, (R. 24) and when he saw that all decedent needed was slack to release the pin, (R. 30) he left decedent there on the west

side of the coupling between the ends of those cars, (R. 35) without warning him of his position, (R. 73) when he knew that decedent had to remain there until the slack came so he could raise the pin, (R. 30, 31) walked to the center of the car where he could neither see decedent, or his lantern, and had to depend on oral signals alone, and from that position gave the signal for slack to the engineer. Both petitioner's engineer (R. 81), and its train foreman (R. 27) knew just what decedent wanted when he called for slack, i. e., 8 to 10 inches to release the pin; (R. 95) they backed that train 12 feet; (R. 105) a movement that caught decedent just as it started; that didn't move like the hands on a clock, and was all over in a second or so.

Petitioner's trainmen testified (R. 94) that decedent could have walked along between the ends of those cars in the usual slack movement, and not been injured, unless the cars moved too fast.

Petitioner's trainmen were negligent in giving decedent the slack with unnecessary and unusual force and speed, and since the fellow servant rule is abrogated by the Act under which this suit is brought, petitioner is liable.

VII.

PROXIMATE CAUSE.

Decedent, at the time of his death, was standing between the ends of the 4th and 5th cars at the rear (or south) end of petitioner's train, performing a duty which had been assigned him by the train foreman. His position was not a dangerous one, because he could have walked along between the ends of those cars when the slack came and not have been injured, unless, as petitioner's trainmen testify, the movement came too fast.

The evidence here is to the effect that the slack movement in question, was given with "unnecessary and unusual force and speed," and we submit that the question of proximate cause, under the evidence in this case, was for the jury to determine.

CONCLUSION.

We submit, that under the evidence in this case, decedent's death was caused by the negligence of petitioner's servants in giving the slack movement, not in the usual and customary manner, but with unnecessary and unusual force and speed; that the opinion of the Court below is not in conflict with the decisions of this Court; and that petitioner's petition for Writ of Certiorari to the Supreme Court of Missouri, should be overruled.

Respectfully submitted,

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